

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIM BOLEY,

Defendant-Appellant.

UNPUBLISHED

April 2, 1999

No. 200497

Van Buren Circuit Court

LC No. 91-007515 FH

Before: McDonald, P.J., and Hood and Doctoroff, JJ.

MEMORANDUM.

Defendant appeals by right his sentence for probation violation following a plea-based conviction of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. We affirm.

On June 28, 1991 defendant pleaded guilty to the underlying charge. On July 2, 1991 the court sentenced defendant to one year in jail and four years' probation, and ordered him to pay a total of \$5,036.15 in restitution, costs, and fees. In 1994 his probation was violated for failure to pay costs and fees. On January 31, 1995 the court extended defendant's probation for one year and nine months. On May 30, 1996 defendant's probation was violated for failure to pay costs and fees as ordered. In pleading guilty, defendant acknowledged that he had not paid as ordered, and that he had not been working to do so. The court delayed sentencing to allow defendant to attempt to obtain employment. On November 18, 1996 the court sentenced defendant to five to ten years in prison, with credit for 146 days, and ordered him to pay \$1,902.14 in restitution.

Defendant argues that his sentence was disproportionate, and that the trial court erred both by failing to consider his financial inability to pay costs and fees as ordered, and by considering allegations that he had committed additional criminal offenses. We disagree and affirm. While nonpayment of restitution or costs and fees cannot be grounds for revocation if the probationer is financially unable to make payments as required, *People v Gallagher*, 55 Mich App 613, 620; 223 NW2d 92 (1974), defendant did not establish that he was financially unable to make payments as required. Defendant acknowledged that he could have obtained employment had he chosen to do so. Under the circumstances, revocation of probation on this ground did not constitute an abuse of discretion or a

violation of defendant's right to equal protection. *People v Double*, 57 Mich App 633, 635; 226 NW2d 594 (1975). Furthermore, any passing reference by the court to allegations that defendant had committed new criminal offenses was at most harmless error. While conduct not alleged in a petition charging probation violation cannot be considered by the court in determining whether a violation occurred, *People v Laurent*, 171 Mich App 503, 505; 431 NW2d 202 (1988), it is clear that the court in this case based its decision to revoke defendant's probation based on his failure to pay as ordered.

The sentencing guidelines do not apply to probation violators. *People v Williams*, 223 Mich App 409, 412; 566 NW2d 649 (1997). Defendant repeatedly failed to comply with the terms of his probation, in spite of the fact that he was given multiple opportunities to do so. His sentence did not constitute an abuse of discretion.

Affirmed.

/s/ Gary R. McDonald

/s/ Harold Hood

/s/ Martin M. Doctoroff